No. 82-1864

In the Supreme Court of the United States

OCTOBER TERM, 1983

131.68 ACRES OF LAND, MORE OR LESS SITUATED IN ST. JAMES PARISH, LOUISIANA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners were deprived of just compensation by the district court's use of the "before-and-after" method for computing compensation for a partial taking.

2. Whether the determination that petitioners' property constituted a single unit rather than two separate parcels for valuation purposes in condemnation proceedings is a determination of law subject to plenary review upon appeal, rather than a determination of fact subject to review under the "clearly erroneous" standard.

3. Whether cropowner petitioners are entitled to recover profits they might have earned upon future harvests of their perennial crop in the absence of a taking as the measure of just compensation, where that measure does not reflect the fair market value of the future crops on the date of taking.

4. Whether petitioners were entitled to a hearing on their objections to the taking before the district court granted the government possession of the property taken pursuant to the "quick take" provisions of the Declaration of Taking Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A16-A28) is reported at 695 F.2d 872. The district court's findings of fact and conclusions of law (Pet. A1-A13) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1983. A petition for rehearing was denied on February 14, 1983 (Pet. App. A29). The petition for a writ of certiorari was filed on May 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners seek review of the judgment entered in two consolidated condemnation cases brought by the United States to acquire land for the construction and operation of an oil storage facility as part of the Strategic Petroleum

Reserve Program. The property at issue consists of approximately 586 acres fronting on the Mississippi River about 64 miles upriver from New Orleans (Pet. App. A3). At the time of the taking, the property was owned by Paul Nelson Falgoust and others (the "landowner petitioners"). Part of the property was leased to Herman J. Falgoust and others (the "cropowner petitioners") for growing of sugar cane. Major oil and pipeline companies had leased other parts of the property, which is in a "strategic and unique location" for the petroleum industry (Pet. App. A4). By declarations of taking filed together with complaints in condemnation and deposit into court of estimated just compensation, the United States accomplished a partial taking of the subject property in May 1978. The United States took only that portion of the subject property leased to the cropowner petitioners; the taking did not include that portion of the property leased for industrial purposes. See Pet. 3; Pet. App. A28 n.6.

After a non-jury trial, the district court determined the amount of compensation due for the partial taking of the subject tract and the taking of the sugar cane crop on the land taken (Pet. App. A1-A13). The aggregate amount of compensation awarded was $756,637 plus interest from the date of taking upon the deficiency in the estimated compensation deposited with the declaration of taking (Pet. App. A14). The court of appeals affirmed (Pet. App. A16-A28).

ARGUMENT

The decision of the court of appeals is correct, and does not conflict with any decision of this Court or of any other court of appeals. No further review is warranted.

1. Petitioners appear to quarrel (Pet. 5-7) with the Fifth Circuit's view that the "before-and-after" method is the preferred approach to determination of just compensation

for a partial taking.[1] While the Fifth Circuit does appear to adhere to that view, see *United States* v. *8.41 Acres of Land, Orange County, Texas,* 680 F.2d 388, 392 (1982), no question concerning that issue is properly presented for review. The district court recognized that two alternative methods (see note 1, *supra*) have been used to compute compensation for a partial taking and stated that the "before-and-after" method is "the most appropriate method for use in this case" (Pet. App. A11). Petitioners did not challenge that determination in the court of appeals, and the court of appeals' opinion, not surprisingly, makes no mention of the issue. The question tendered for review accordingly is not properly presented to this Court. In any event, petitioners have not suggested any respect in which they were prejudiced by use of the "before-and-after" method.[2]

2. Petitioners list as a "Question Presented" (Pet. i) whether the determination that their property should be valued in condemnation as a single unit rather than two separate parcels is a determination of fact reversible only upon a showing of clear error. But the petition contains no argument supporting their assertion that another standard of review by the court of appeals was appropriate on this issue. Nor are any decisions of this Court, or any other court

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[1]Under the "before-and-after" method just compensation is computed as the difference between the value of the entire property before the taking and the value of the remainder left after the taking. Under an alternative approach just compensation is computed as the sum of the value of the portion of the tract taken and any severance damages to (*i.e.* diminution in value of) the remainder.

[2]Petitioners observe (Pet. 6) that "severance damage[s] [are] not at issue" in this case. It is accordingly difficult to see how the two methods of computation of just compensation for a partial taking could have produced divergent results. See note 1, *supra.*

cited in support of petitioners' contention that such review was required. Accordingly, there is no occasion for this Court to address the question presented by petitioners.

In any event, the decision of the court of appeals is clearly correct. Petitioners' effort to present the standard of review issue apparently was prompted by the court of appeals' statement that certain contentions advanced by petitioners upon appeal "raise issues of fact, not issues of law" (Pet. App. A28). The court of appeals' comment was directed at petitioners' contentions that upward numerical adjustments in the value per acre yielded by comparable sales employed in computing just compensation were insufficiently generous (see Pet. App. A27-A28; Petitioners' C.A. Br. 17-19). The court of appeals correctly observed (Pet. App. A28) that the propriety of these adjustments entails only weighing of evidence and accordingly is a question of fact.

As part of their argument that acreage values derived from comparable sales had been insufficiently adjusted, petitioners suggested that the district court "erred in failing to consider front land-back land characteristics of the subject property" (C.A. Br. 18). The court of appeals did not separately address this contention — treating it as part of petitioners' challenge to the district court's computation of just compensation. Petitioners did not contend that the district court had misapprehended the governing legal rule, but only that it had misapplied that rule to the facts of this case.[3] Although petitioners claimed that the district court should have valued their property as two separate tracts (treating "front lands" closer to the river and "rear lands"

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[3]Petitioners' brief recited (at 8): "[We] do not quarrel with the district court's methodology. [We] do submit, however, that the end product [of valuation] should have totaled the [amount of compensation testified to by petitioners' expert witness]."

further removed therefrom as separate tracts), they have never challenged the district court's findings (Pet. App. A4-A5) that parcels such as theirs are ordinarily sold as a unit, and that the highest and best use of the entire tract, both before and after the taking, is for industrial development of the kind dependent upon deep water access. In the circumstances, there was no occasion for the court of appeals to apply, much less announce, any novel principle of law in upholding as not clearly erroneous the district court's valuation of the subject tract as a unit. See *Sharp* v. *United States,* 191 U.S. 341, 354 (1903).

2. a. Cropowner petitioners contend (Pet. 7-15) that they were denied just compensation for the taking of their sugar cane crop. One element of the overall award of just compensation made by the district court was $82,931, representing compensation for the loss of the sugar cane crop (Pet. App. A8).[4] Sugar cane is a perennial plant with a three-year crop cycle; that is, one year's planting typically yields crops for three successive years before replanting is necessary. Accordingly, the district court awarded compensation for the taking of three years' crops. The amount awarded was computed as the sum of anticipated revenues from the 1978 crop less costs, plus two thirds of the cost of planting the acreage. Thus, the district court employed anticipated profits as the measure of value of the fall 1978 crop and employed cropowner petitioners' costs as the measure of value of the 1979 and 1980 crops (Pet. App. A8-A9, A21-A22).

Petitioners' threshold contention (Pet. 7) that the lower courts awarded them compensation only for one year's crop, ignoring the perennial nature of sugar cane, is

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[4]The overall award was not apportioned between the landowner and cropowner petitioners by the district court because the parties did not seek a judicial apportionment. Pet. App. A24 n.5.

obviously unfounded — for the award includes compensation for the 1979 and 1980 crops. Cropowner petitioners contend, however, that the only proper measure of just compensation is their projected profits over the entire three-year growing cycle of sugar cane. That contention is unfounded.

It is settled that just compensation requires only that the condemnee be put "in as good a position pecuniarily as if his property had not been taken." *Olson* v. *United States,* 292 U.S. 246, 255 (1934). But petitioners do and could not suggest that the fair market value at the date of taking in May 1978 of their future crops was equal to the profit they might have ultimately reaped had the crop cycle been uninterrupted by the taking. To assume that a " 'willing buyer would pay [that amount] in cash to a willing seller' " (*Almota Farmers Elevator & Warehouse Co.* v. *United States,* 409 U.S. 470, 474 (1973)) is to ignore both the time value of money, see *Jones & Laughlin Steel Corp.* v. *Pfeifer,* No. 82-131 (June 15, 1983), slip op. 12-13, and the inherent hazards of any agricultural enterprise. In short, to have awarded petitioners the profits they could ultimately have earned had their land not been taken would have put them in a far better position than they would actually have enjoyed had the taking not occurred.[5]

This disparity is not at all hypothetical in this case. As the court of appeals noted (Pet. App. A22 n.3), the price of sugar more than doubled between 1978 and 1980. Petitioners

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[5]Petitioners' reliance upon *W.H. Elliott & Sons Co.* v. *E.&F. King, & Co.,* 291 F.2d 79, 82 (1st Cir. 1961), is misplaced because that case involved damages for a continuing injury to perennial plants, rather than a one-time taking of such plants. The language quoted by petitioners (Pet. 13-14) does not necessarily entail the award of speculative future profits as an element of damage because the measure of damages prescribed is based upon the difference between the value of the uninjured and the injured plants.

seek an award based upon the profits they could have earned for their 1979 and 1980 crops based upon the prices prevailing in those years. But there is no reason to suppose that the price a buyer would have paid in May 1978 for these future crops would reflect the rapid price increase that followed that date. Petitioners offer no justification in law or economics for bestowing this windfall upon themselves. Moreover, they have not demonstrated, or even argued, that the award made by the district court for the value in 1978 of the 1979 and 1980 crops, based upon petitioners' planting costs, represents less than fair market value.[6]

b. Petitioners also contend (Pet. 11-13), that the court of appeals improperly treated their crops as a fixture, attached to the land, whereas Louisiana law treats unharvested crops as movable personalty. The court of appeals did no such thing. So far as we can discern, petitioners' misconception is based upon the court of appeals' comment (Pet. App. A23-A24; footnote omitted) that

> The landowners received the difference in the market value of their tract of land before and after the taking. That sum included compensation for lost opportunities to earn profits from the land after the taking.

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[6]Indeed, the district court's method was generous to petitioners in several respects. For instance, the entire expected profit on the October 1978 crop was treated as an element of damage even though the date of taking was May 1978 (Pet. App. A24 n.4). See also *id.* at A22 n.2.

Petitioners complain (Pet. 14) that planting costs were treated inconsistently — as an expense charged against revenues to determine profits in 1978, and as an index of future crop value with respect to the anticipated 1979 and 1980 crops. There is nothing irregular about this treatment. Projected 1978 revenues obviously had to be reduced by a share of planting costs lest petitioners receive a windfall for that year. At the same time, petitioners' investment in their future crops was a reasonable measure of the market value of those crops in 1978.

> Adding compensation for the loss of net profits after the date of the taking [to the crop taking award] would thus have resulted in double compensation.

By this the court of appeals plainly meant that future profits not reflected in the fair market value of future crops simply are not part of just compensation *for the sugar cane taking*, and that the *potential* of the *land* to earn future profits was fully reflected in the award of just compensation for its taking.[7] The status of growing crops under Louisiana law is irrelevant to the point made by the court of appeals.

4. Finally, petitioners argue (Pet. 15-16) that they were entitled to a hearing upon their contentions that the taking was not for a public use or was otherwise unlawful, prior to the grant of possession of the property to the United States under the "quick take" provisions of the Declaration of Taking Act, 40 U.S.C. 258a, that were employed in this case.[8] The court of appeals held (Pet. App. A26-A27) that neither the Fifth Amendment, nor either of the statutes upon which petitioners relied, requires such a hearing.

In the court of appeals petitioners relied upon 42 U.S.C. (Supp. V) 6239(g), which directs that efforts be made to acquire properties needed for the Strategic Petroleum Reserve through negotiation before resort to condemnation, and similar provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of

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[7]The cropowner's lease was apparently voidable at will by the landowner petitioners, and the land was accordingly valued as though it was a fee not subject to lease (Pet. App. A24 n.5; see page 5 note 4, *supra*).

[8]The Declaration of Taking Act provides that upon filing of a declaration of taking and deposit of estimated compensation with the court title to the lands covered by the declaration of taking immediately vests in the United States. The right to just compensation for the property —the deposit plus any deficiency determined to be due and interest thereon — vests in the former landowner.

1970, 42 U.S.C. 4651(1). Petitioners appear to have abandoned reliance upon the latter provision in this Court. In any event, as the court of appeals observed (Pet. App. A26-A27), neither statute in any way suggests that landowners are to be afforded pre-taking hearings.

Petitioners cite no authority for their due process claim. That claim is frivolous.[9] This Court has recognized the validity of the "quick take" procedure, and that title shifts to the government thereunder upon payment of estimated compensation into Court. *United States* v. *Dow*, 357 U.S. 17, 21-22 (1958). Indeed, the Court has recognized that the United States may take property by physical seizure "without authority of a court order," leaving the property owner to seek just compensation under the Tucker Act. *Id.* at 21. Plainly then, due process does not require that petitioners be afforded a pre-taking opportunity to forestall the taking. The property owner's interest are fully protected, from the moment of the taking, by the government's liability to pay just compensation. That obligation satisfies the Fifth Amendment because the sum ultimately paid "stands in place of the property and represents all interests in the property taken" (*Eagle Lake Improvement Co.* v. *United States*, 160 F.2d 182, 184 (5th Cir.), cert. denied, 332 U.S. 762 (1947)). See *United States* v. *Rodgers*, No. 81-1476

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[9]It is in any event doubtful that petitioners can claim any violation of due process, for they are unable to demonstrate prejudice — a necessary element of a due process claim. See *United States* v. *Valenzuela-Bernal*, No. 81-450 (July 2, 1982), slip op. 10. Petitioners' contentions that the taking was unlawful were heard and rejected by the district court during the course of the condemnation action (3 R. 328). Petitioners did not challenge that disposition on appeal and do not do so in this Court either, limiting their argument to the contention that the hearing on their objections to the taking should have been held sooner. Petitioners are thus in the anomalous position of insisting that additional process is due to protect "rights" that have been determined not to exist. See *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

(May 31, 1983), slip op. 18-19, 24-25. Just as the United States' deposit of estimated just compensation and liability for any deficiency, with interest (see page 8 note 8, *supra*), satisfies the Fifth Amendment if the taking is valid, the United States' liability to pay the landowner just compensation for its "temporary use and occupation," *United States* v. *Dow, supra,* 357 U.S. at 26, satisfies both the Just Compensation and Due Process Clauses in the unlikely event that the taking were ultimately held invalid on grounds like those raised in the district court by petitioners.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10]Although the validity of a taking is subject to judicial review, the scope of that review is quite narrow. *Catlin* v. *United States,* 324 U.S. 229, 240-243 (1945); *Berman* v. *Parker,* 348 U.S. 26, 33-36 (1954). See generally, *United States* v. *162.20 Acres of Land in Clay County, Mississippi,* 639 F.2d 299, 303-304 (5th Cir.), cert. denied, 454 U.S. 828 (1981). We are unaware of any reported case in which a taking by the United States has been held invalid on grounds like those presented by petitioners.

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